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No. 349

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1941.

THE DETROIT EDISON COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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THE DETROIT EDISON COMPANY,
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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit:

The undersigned, on behalf of the above named petitioner, pray that a writ of certiorari issue to review a final decree of the United States Circuit Court of Appeals for the Sixth Circuit rendered on May 12, 1941, in the case between the above named parties docketed therein as No. 8735.

Opinions Below.

The opinion of the Circuit Court of Appeals was handed down on May 12, 1941, and is reported in 119 Fed. (2d) 730 (R. 686). The Securities and Exchange Commission issued an opinion dated August 5, 1940, as its Holding Company Act Release No. 2208, which is reported in 7 S. E. C. 968 (R. 671).

Jurisdiction.

The decree of the Circuit Court of Appeals was entered May 12, 1941 (R. 685). This petition for a writ of certiorari is filed before August 12, 1941.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803; 15 U. S. C. A., Sec. 79), particularly sections 1 and 2(a)(8) thereof, which are printed in the appendix, *infra*.

Matters Involved.

In the Circuit Court of Appeals the proceeding was an original one brought by petition filed pursuant to section 24(a) of the Act (49 Stat. 834; 15 U. S. C. A., Sec. 79x) to review an order of the Securities and Exchange Commission (referred to herein as the "Commission") insofar as it denied petitioner's application for an order declaring that petitioner is not a subsidiary of The North American Company (a holding company registered as such under the Act, referred to herein as "North American").

Section 2(a)(8) of the Act defines the companies which it subjects to regulation as subsidiary companies. It prescribes a formula and procedure for determining whether a company is so subject to the Act. The definition starts with a holding company ownership of 10% of voting securities, and further provides that the Commission shall declare that an applicant is not a subsidiary company of

a specified holding company if the Commission finds (i) that the applicant is not controlled by the specified holding company, and (ii) is not an intermediary of control, and (iii) that the management or policies of the applicant are not subject to a controlling influence by such holding company so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties and liabilities imposed in the Act upon subsidiary companies. Petitioner's application was made under that provision.

The Circuit Court of Appeals held that there is no evidence in the record that petitioner is controlled by North American or that it is an intermediary of control.

The petition for review was denied however, with reasoning which amounts to the theory that Congress had delegated to the Commission a discretion to determine the zone of its own jurisdiction.

The Court held in effect that the Act conferred on the Commission a double discretionary power, first, to decide what meaning should be given, as a matter of policy, to the words "controlling influence" (rather than a duty to find whether evidence satisfied the objective standard of the natural meaning of the words) and, second, to decide whether, as a matter of policy, in the public interest or for the protection of investors or consumers as conceived by the Commission, a particular subsidiary should be regulated (rather than a duty to find whether evidence satisfied the objective standards of public interest and investor or consumer protection set forth in the preceding section of the Act).

Applying that theory, the Court held in substance that the first discretion had been validly exercised by construing

"controlling influence" to mean an influence which is not controlling and is not operative, but which the Commission suspects might, if put to work, be found at some future time in relation to some future facts to exist and be partially effective; and that the second discretion had been validly exercised without any statement of fact or law on the subject by the Commission, in spite of proof (and admission by the Commission to the Court) of the absence of any harm, past or present, to the public interest or investors or consumers.

Jurisdiction was assumed by the Commission without any finding of facts or statement of opinion as to its basis. The Circuit Court of Appeals held that it was not necessary for the order of the Commission to be supported by jurisdictional findings, that the question was not raised by the petition and was incompatible with it, that it was a constitutional question and could not be raised until some order of the Commission adversely affects petitioner, and impliedly, that the order before it for review did not adversely affect petitioner.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the sentence of the Act here involved delegated to the Commission discretionary powers rather than a judicial duty;

2. In its construction of the term "controlling influence" in the Act;

3. In its construction of the reference in the Act to the public interest and the protection of investors and consumers;

4. In holding that it was unnecessary for the Commission to make any specific jurisdictional findings; and

5. In denying the petition for review of the Commission's order.

Questions Presented.

The questions here to be presented are:

1. Does the sentence of the Act here involved, defining the scope of the Commission's jurisdiction, entitle an applicant to have the Commission function as a judge and jury finding objectively determinable facts, or does it require an applicant to persuade the Commission to exercise subjectively an administrative or legislative discretion?

2. What is the meaning of the term "controlling influence" in the Act?

Is it a possibly latent power, not being exercised, which might be found to be partially effective if put to a test at some future time? Or is it an influence which in fact exists and is in fact controlling at the time of hearing?

3. What are the tests for the public interest and the protection of investors and consumers, to be applied under the Act?

Must the finding required by Section 2 (a) (8) (iii) be made when there has been proven or admitted an absence of all evils enumerated in Section 1 of the Act?

4. Was it necessary for the Commission or the Court to determine whether the Commission had jurisdiction to act in this case?

Reasons for Granting the Writ.

The principle of the decision of the Circuit Court of Appeals is novel and far reaching in its implications. It involves in essence the question of whether the jurisdiction and field of control of administrative agencies is to be determined through judicial principles and processes or through the discretion of the agency whose jurisdiction is in question.

The Act defines in detail what utility holding companies and subsidiaries are subject to the jurisdiction and controls of the S.E.C. It establishes a procedure whereby such jurisdiction shall be delimited.

We are well aware of, and do not here question, the principle that, within the field of administrative jurisdiction, the administrative discretion, resting upon expert judgment, is entitled to great weight and is not lightly to be reviewed or reversed by the courts. That principle is not here in issue. Rather there is posed the question of whether an administrative agency may determine and expand its own jurisdiction through the exercise in its own favor of its own discretionary judgments.

We respectfully urge that this court should pass upon the novel question of whether the Congress intended, or the Constitution permits, a delegation of power under circumstances such that the recipient of power determines, for itself, the scope of that power through discretionary judgments, rather than through processes which are essentially judicial and dependent upon facts proven by evidence as against administrative speculation.

Construction of an Act, in terms providing for findings as a basis for regulation or exemption, so as to empower an administrative agency to act through exercise of dis-

cretion in construing the language of the law, and by basing its decisions upon speculations about the future, nullifies the obvious legislative intent to establish a judicial procedure.

It is further submitted that the Circuit Court of Appeals has overruled petitioner's objection to Federal jurisdiction in a way probably in conflict with applicable decisions of this court. It held in substance that Federal jurisdiction may be based upon consent or waiver by a litigant and that a negative order establishing a status under a Federal statute may not be reviewed to determine whether the person thereby affected is within the field of Federal jurisdiction covered by the statute.

WHEREFORE, it is respectively submitted that the petition should be granted.

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August, 1941.